No. 86-1729

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CALIFORNIA, EX REL.
STATE LANDS COMMISSION,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

JOHN K. VAN DE KAMP
Attorney General
of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
JOSEPH BARBIERI
Deputy Attorney General
(Counsel of Record)

350 McAllister Street
San Francisco, CA 94102
(415) 557-8820

Counsel for Petitioner

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ARGUMENT

I

Mono Lake and the Missouri River are both inland navigable bodies of water. In Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) the federal government, as owner of the uplands, opposed a State as owner of the sovereign bed. The parties disputed whether the movement of the Missouri River

should be characterized as accretion, and both parties presented at trial substantial legal arguments and factual evidence to support their positions. In the present action, the United States, the owner of the uplands, again opposed a State as owner of a sovereign bed. The parties here have disputed whether the movement of Mono Lake's shoreline should be characterized as reliction, and both parties presented at trial substantial legal arguments and factual evidence to support their positions. In Wilson, without mentioning the Submerged Lands Act, this Court held that federal law must borrow state law to determine whether the river movement constituted an avulsion or accretion. In this action, however, the Ninth Circuit held that the Submerged Lands Act mandated that federal law must create federal common rules of decision to resolve these kinds of disputes whenever a State's claim is based on its sovereign bed ownership. This Court

must decide whether the Ninth Circuit's absolute and inflexible choice of federal common law presents a conflict with Wilson worthy of the Court's review.

To reconcile this apparent conflict, the Ninth Circuit relied solely on its belief that Wilson involved riparian claims of the state of Iowa. This was a gross misreading of the facts in Wilson, and in their responses neither the United States nor the intervenors even mention, much less defend, the Ninth Circuit's attempt to distinguish Wilson. Instead--having already abandoned the district court's puzzling distinction between the two cases, see California Petition for Certiorari ("Cal. Pet.") at 6,n.2--the United States for the first time in this litigation

advances a new distinction.[1] According t

the United States:

> "By contrast, as this Court recognized in State Lands Commission (457 U.S. at 278 n.7), Wilson was 'a case not involving a boundary dispute.' The issue before the Court in Wilson was not the choice of federal or state law to determine ownership of accreted or relicted lands, but rather, in the Court's own statement of the issue, 'whether federal or state law determines whether the critical changes in the course of the Missouri River in this case were accretive or avulsive.'" Brief for the Federal Respondents in Opposition ("Fed. Br.") at 9.

The United States badly misconstrue

what this Court meant in California v

United States, 457 U.S. 273 (1982), when i

stated that Wilson did not involve "

boundary dispute." Because the Unite

States' analysis of Wilson depends on thi

out-of-context quotation, we quote th

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1. The fact that the district court the Ninth Circuit and the respondents hav disagreed among themselves about how Wilso can be distinguished alone suggests th need for this Court's review.

entire passage from Wilson to which this Court referred:

> "The Court of Appeals, noting the existence of a body of federal law necessarily developed by this Court in the course of adjudicating boundary disputes between States having their common border on a navigable stream, purported to find in those doctrines the legal standards to apply in deciding whether the changes in the course of the Missouri River involved in this case had been avulsive or accretive in nature.
>
> "The federal law applied in boundary cases, however, does not necessarily furnish the appropriate rules to govern this case." Wilson, 442 U.S. at 672 (emphasis added).

When this Court in California v. United States stated that Wilson was "not a boundary dispute," it meant that Wilson was not an interstate boundary dispute for which federal common law necessarily must be created. Like Wilson, the present action is not an interstate boundary dispute, and like Wilson, this is not a case for which federal common law must be created.

The United States' further attempt to distinguish Wilson is equally misguided. The United States characterizes Wilson as a case involving the "definitional" distinction between accretion and avulsion, and then conclusorily asserts that this case simply involves the "ownership of accreted or relicted lands." See Fed. Br. at 9. The present case, however, equally involves the "definitional" characterization of the shoreline changes at Mono Lake. See Cal. Pet. at 15-16. The whole reason for the trial below was to determine whether the uncovering constituted a reliction. That is why the district court appointed an independent expert to develop hydrological information, and why the parties entered a stipulation of historical facts, briefed at length (over 200 pages) the legal implications of the shoreline changes, produced their own witnesses and evidence about the shoreline changes, and after a week-long bench trial,

argued whether the recession of Mono Lake constituted a reliction. Thus, the United States' conclusory statement that this case simply involved the ownership of "relicted lands"--as if that legal characterization was undisputed--flatly ignores the reason for the lengthy and costly proceedings in the trial court. The present case in every sense involved the "definitional" aspects of shoreline changes in the way that Wilson did.

The respondents also urge two theories to counter California's argument that the Submerged Lands Act provides no basis for federal common law because the Act merely confirmed preexisting state ownership of inland navigable waters. First, the intervenors, quoting dictum in United States v. California, 332 U.S. 19, 30 (1947), suggest for the first time that the States had only "qualified" ownership of inland navigable waters under the equal footing doctrine and that the Act restored

full title to these lands to the States. Brief in Opposition of Respondents-Intervenors at 6 ("Int. Br."). This false assertion defies this Court's pronouncement just weeks ago reaffirming the States' undisputed ownership of inland navigable waters under the equal footing doctrine. Utah Division of State Lands v. United States, 55 U.S.L.W. 4750 (June 8, 1987).2/

Second, the United States cryptically argues that the "Court in Corvallis held that the equal footing doctrine did not convey an ambulatory title, whereas the Submerged Lands Act established exactly that in Section 5(a), with regard both to inland and coastal

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2. Even if Congress was concerned that United States v. California "clouded" the States' title to inland navigable waters, see Int.Br. at 6, the effect of the Submerged Lands Act as to inland waters was only to confirm what the States already owned. It is the Court's rulings (e.g., Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212), not Congress's excessive caution, that determines the extent of state ownership under the equal footing doctrine.

waters, where the water borders federal lands." Fed. Br. at 8. The United States cannot seriously suggest that, prior to the passage of the Act, the boundaries of inland navigable waters were fixed at their location on the date of a State's admission to the Union, and that it was only the Act that allowed the boundaries to move with changes in shoreline location. Where application of the accretion doctrine has been appropriate, the boundaries of inland waters have always been "ambulatory". County of St. Clair v. Lovingston, 90 U.S. (23 Wall) 46 (1874).

Finally, the respondents make no attempt to explain why Congress would have intended that the Submerged Lands Act direct the use of federal common law rules to resolve disputes along inland waters in situations where state law would have controlled prior to the passage of the Act. Given this Court's recent reiteration of its policy regarding pre-statehood

conveyances--that it will "not lightly infer a congressional intent to defeat a State's title to land under navigable waters," Utah Division of State Lands, 55 U.S.L.W. at 4751--it would be the height of irony if the Submerged Lands Act's promotion of State ownership served as the basis for defeating California's claim to land that California unquestionably owned when diversions commenced in 1940.

In short, the respondents make no serious attempt to defend the choice of law analysis of the Ninth Circuit. Instead, they attempt a new rationalization for the district court's choice of federal common law. These latest arguments once again fail to explain both how the Act "federalized" title disputes regarding inland waters that were controlled by state law prior to the Act, and how Wilson can be meaningfully distinguished from this case.

II

Rather than defend the Ninth Circuit's choice of law analysis, the respondents seek to dissuade this Court from granting this petition by emphasizing issues that were either unaddressed by the Ninth Circuit or peripheral to its decision. Although a full discussion of these issues must await a brief on the merits, a brief reply to some of them is warranted.

First, relying on the Act creating the Mono Basin National Forest Scenic Area, 98 Stat. 1619, the intervenors argue that the use of state law would impair federal interests at Mono Lake. Int. Br. at 2-5. The Ninth Circuit, however, never weighed the impact of a state rule on specific federal interests because it refused to apply the three-part balancing test in Wilson. App. A at A-5. In any event, the intervenors' reliance on the federal Scenic Area as the basis for using federal common law is highly improper, because the Scenic

Area--which was created four years after this litigation commenced--was "intended to be entirely neutral" on this litigation. 1984 Cong. Rec. H.R. 9431 (Sept. 12, 1984) (remarks of Act's author, Rep. Lehman).

Second, the respondents present a number of internally inconsistent arguments about the meaning of California law, simultaneously arguing that it is "without any foundation in the common law of accretion," Int. Br. at 20, "consistent" with the federal rule of perceptibility, Fed. Br. at 17 n.15, "uncertain," Int. Br. at 20, and "aberrational," id. Naturally, California disagrees with much of this discussion and believes that the application of California law in these factual circumstances is historically established and accepted by the United States. Cal. Pet. at 3-4, 17-18. More to the point, California law is not the issue here. The Ninth Circuit, by requiring the automatic use of federal rules, never

addressed the meaning of California law and whether it was "hostile" to federal interests. Unless the Ninth Circuit's approach is corrected by this Court, federal courts throughout the country will be "mandated" to create separate federal rules regardless of the reasonableness of local state rules. Given this, the respondents' erroneous arguments about the meaning and applicability of California law are irrelevant at this time and cannot be considered until the propriety of applying California law has been reviewed in light of the Wilson criteria.3/

Third, the respondents argue that application of the common law "drainage"

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3. Even if the meaning of California law were disputed and uncertain, that is simply an incident of most litigation. Under Wilson, the United States must bear the risks faced by a private party litigating the same issue. Wilson, 442 U.S. at 673. Moreover, the possibility that the United States may prevail under California law further negates any argument that California is inherently hostile to federal interests.

rule advocated by California is contrary to the so-called majority rule that accretion or reliction, regardless of cause, belongs to the upland owner. Fed. Br. at 11-12. The drainage rule, however, is not a rule of "artificial reliction;" it is a rule that says that an intentional uncovering is different in kind (i.e., a physically different process) than a reliction. See Cal. Pet. at 20-21. Because an intentional uncovering is not "reliction," any rule that reliction regardless of cause belongs to upland owners never comes into play. For this reason, the same courts that apply the drainage rule comfortably apply the rule that accretion regardless of cause belongs to the upland owner. E.g., compare Martin v. Busch (Fla. 1927) 112 So. 274 (drainage rule) with Board of Trustees v. Medeira Beach Nominee, Inc. (Fla.App. 1973) 272 So.2d 209, 212 (following "majority" rule). California's arguments are entirely

compatible with traditional common law rules.

Fourth, the respondents contend that California's arguments about the common law reliction doctrine are erroneous and deviant, because, they argue, "[s]ince Roman times, the law of alluvion has been applied to the same problem presented by this case," Int. Br. at 12; see Fed. Br. at 11-12. The rule of alluvion, however, was not extended to lakes under Roman law, Digest of Justinian, Book 41, §§ 1 and 2, p. 56 (translated by Zulveta), nor under civil law, the Code Napoleon, § 558, p. 154 (1824 translation); Walton, The Civil Law in Spain and Spanish America, § 367, p. 195; Zeller v. Southern Yacht Club (1882) 34 La.Ann. 837; see Ker & Co. v. Couden (1912) 223 U.S. 268, 276. Moreover, English common law never applied the doctrine of alluvion to lakes because non-tidal waters were not owned by the Crown, see Bristow v. Cormican, 3 App. Cases 641,

and there are other reasons to question whether English common law treated the recession of water in the same manner as alluvion, see Callis, Upon the Statute of Sewers (1624), at 47; Woolrych's Law of Waters (1853) at 29. Thus, despite the respondents' repeated assertions, there is no inherent reason why the rule of alluvion must necessarily apply when lakes are uncovered; certainly there is no basis for assuming that the rule of alluvion historically applied to rivers automatically applies in all its particulars to boundary changes along navigable lakes. Whether the law of alluvion should be the appropriate federal rule here (assuming state law does not apply) would require consideration of numerous historical, physical and policy factors completely ignored by the Ninth Circuit in its simplistic assumption that the common law reliction doctrine was necessarily applicable.

Fifth, the respondents repeatedly dispute the merits of California's argument that there are no settled federal common law standards for determining whether the uncovering of a navigable lake constitutes a "reliction."[4/] They argue, for example, that California's proposed test for what is gradual and imperceptible is "baseless, and plainly warrants no further review." Fed. Br. at 15. The respondents' confidence is based on their assumption that the test (usually in dicta) for determining whether a shift in a river is accretive is necessarily the same test for determining whether the change in the shoreline of a lake is a reliction. Yet the respondents do not deny that some common law courts, as well as the Special Master in Utah v. United States, 420 U.S. 304 (1971), refused

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4. The respondents' detailed technical arguments regarding the meaning and application of the accretion doctrine, e.g., Int. Br. at 21-26, demonstrate how unsettled common law is when applied to the facts of this case.

to apply the respondents' version of the gradual and imperceptible test to a navigable lake. Nor do they cite any authority (other than dicta) that actually developed standards for characterizing whether lake shoreline movement constitutes reliction. See Cal. Pet. at 20-21.

Other federal officials do not share the respondents' confidence. In a Bureau of Land Management memorandum cited in Utah Division of State Lands, 55 U.S.L.W. at 4753 n.*, the BLM frankly admitted that the "test was applied to a river in [County of St. Clair v. Lovingston] and has generally been applied to rivers. It should be readily apparent that the test would lose its utility when applied to a lake of any magnitude whatsoever." 4 Record, Doc. J., p. 33-34, Utah Division of State Lands, 55 U.S.L.W. 4750 (emphasis added). The BLM memorandum proceeded to acknowledge legal authority (supporting California's view) that "large variations in lake level over a

relatively short period of time did not meet the gradual and imperceptible test." Id. (emphasis added); see also Cal. Pet. at 3-4, 17, 21 (citing refusal of various federal officials to apply reliction doctrine to uncovered lake beds). In light of the federal government's historic refusal to mechanically apply the reliction doctrine to uncovered lake beds, its current representation that the law in this area is "settled" is disingenuous. There are no settled federal standards for determining whether the uncovering of a navigable lake constitutes a reliction--particularly where the lake involved is a saline, terminal lake in the western United States that has been uncovered by an intentional diversion of its waters.5/

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5. Some members of this Court also do not appear to share the United States' confidence that the reliction doctrine necessarily applies when lake bed is uncovered. See Utah Division of State Lands, 55 U.S.L.W. at 4756 (arguing that Congress intended to reserve Utah Lake because if the lake bed was intentionally

CONCLUSION

A writ of certiorari should be granted to review the decision of the Ninth Circuit.

DATED: July 9, 1987

JOHN K. VAN DE KAMP
Attorney General
of the State of California

N. GREGORY TAYLOR
Assistant Attorney General

JOSEPH BARBIERI
Deputy Attorney General

Attorneys for Petitioner

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exposed for use as a reservoir, "State land would be exposed which the State presumably could develop or convey as it saw fit") (White, J., dissenting) (emphasis added). The majority expressed no opinion on this issue.